No. 14,919

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS E. WOLCHER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Louis E. Wolcher, the appellant, was indicted for violation of section 145(b) of the Internal Revenue Code of 1939, 26 U.S.C. sec. 145b, for wilful evasion of income tax. The jury found the defendant guilty, with a recommendation of leniency. The District Court entered judgment on

September 4, 1953, sentencing him to two years imprisonment and a $10,000 fine.

On September 2, 1955, defendant filed in the District Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, a motion for new trial on the ground of newly discovered evidence, with supporting affidavits (R. 3, et seq.). The District Court entered an order dated September 12, 1955, denying the motion for new trial (R. 26). Defendant appeals from said order. Notice of appeal was filed September 21, 1955 (R. 27).

The provisions sustaining jurisdiction are:

(a) Jurisdiction of the District Court: Rule 33 of the Federal Rules of Criminal Procedure; 18 U.S.C. sec. 3231.

(b) Jurisdiction of this Court: 28 U.S.C. sec. 1291; 28 U.S.C. sec. 1294. In *Balestreri* v. *United States,* 224 F. 2d 915, this Court ruled that it had jurisdiction of an appeal from an order denying a motion for new trial on the ground of newly discovered evidence.

CONCISE STATEMENT OF THE CASE

A. General Background

This Court, in its opinion on the appeal from the conviction (*Wolcher* v. *United States,* 218 F. 2d 505), made reference for a background statement to its earlier opinion (*Wolcher* v. *United States,* 200 F. 2d 493), where the Court stated:

> "The theory of the Government's proof was that during the year in question Wolcher collected large sums from the sale of whisky from which he derived income which he failed to return. The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher. His income tax return reported no gross income from sales of liquor at wholesale (which the sales above

described were) except for an item of $3,000 profit made on a transaction not involved here.

"Wolcher admitted the over-ceiling transactions, but contended that although he received those proceeds he made no profits from these operations for the reason that in purchasing or acquiring the liquor, he himself was obliged to make over-ceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the over-ceiling bonus paid Gersh amounted to $20 and on others to $25 a case. He fixed the amount which he had thus paid Gersh as approximately $115,000. Gersh was the publisher of a New York City trade paper called 'The Cash Box' devoted entirely to coin machines. Wolcher operated a concern which sold coin operated machines and he had known Gersh for 15 or 20 years. Wolcher testified that he sent substantial sums of money to Gersh during the period in question and that these remittances were made by check and by cash either through the mail or by express or delivered to Gersh in person."

B. Proof at Trial

The proof at the second trial showed ultimate receipt by Wolcher of cash payments over ceiling on whiskey sold at wholesale to tavern owners.

1. Appellant received 5,138 cases of whiskey through three San Francisco licensed liquor wholesalers. The great bulk of the whiskey,—all but 500 cases—came from the East Coast. Four shipments from the East came through wholesaler Franciscan Distributing Co. and two eastern shipments came through George Barton Co. The 500 cases appellant bought from Rathjen Bros.

The representatives of Franciscan Co. (Samuel Weiss) and George Barton Co. (James Oligny) testified that usual distiller sources were drying up so far as their firms were concerned, but that arrangements were made by Wolcher

to get the whiskey from the East. To handle the importing, Franciscan Co. received a fee of $2 per case. Barton Co. received a fee of $1 per case on one shipment. On another shipment it divided the margin permitted to wholesalers under OPA, Wolcher's share being $3,000. (R. 14109, pp. 100-105, 122ff, 140-142.)

Vance Hammerly, auditor for Rathjen's, testified that the company was so short of liquor that it instituted allotments of whiskey among its 5,000 customers in accordance with previous purchase volumes, that however, this was not done in the case of these 500 cases of Old Brook whiskey sold to Gold Coast, a bar owned by defendant, and that these were not handled by Rathjen's general commission salesmen but by a house salesman, Ray Worthy.[1]

2. The proof of appellant's cash receipts was made out in part by the Government, through the testimony of thirteen tavern owners and Roy Clemens. The Government also introduced defendant's guilty plea to a charge of ceiling violation on whiskey involved in the present case (R. 239-245).

Appellant not only conceded the receipts established by the Government but indeed admitted black market sales at wholesale and cash receipts of between two and three times the amounts established by the Government witnesses.

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[1] Rathjen's ledger sheets (Deft's Exh. C and D) show that for months before and after this sale to the Gold Coast in May, 1943, the largest sale by Rathjen for any month to either Gold Coast or Silver Rail Taverns never exceeded $600 in round numbers. In contrast here was a sale invoiced for $25,950, for 500 cases (R. 14109, p. 46).

The proof of over-ceiling receipts by defendant, as summarized in the summation to the jury by Assistant United States Attorney Schnacke, was as follows:[2]

Cases of Whiskey Purchased by Defendant	Black Market Sales No. of Cases	Unreported Profit
A. Shipped from East Coast to:		
Franciscan Distributing Co.		
100 Supreme Bourbon	68	$ 1,472.20
500 Schenley Royal Reserve	335	7,292.95
500 Golden Wedding	450	11,475.00
1,000 Gallagher & Burton	815	21,243.00
George Barton Co.		
500 Gallagher & Burton		
2,038 Old Boston Rocking Chair	1,432	47,370.56
		$88,853.71
B. Purchased from Rathjen Bros.		
500 Old Brook	300	6,150.00
5,138 Total	3,400	$95,003.71

3. Evidence of Appellant (Record References, Record No. 14109). Appellant Wolcher testified that he did not report the overage he received on sales of whiskey on his income tax return because the overages he received were approximately equal to overages which he had to pay (R. 366). (He reported income of $66,900. The indictment charged his income was $102,000. R. 25.)

During 1943 appellant had a direct interest in three taverns selling liquor by the glass and certain members of his family were interested in three other taverns selling liquor by the glass (R. 346-7). Appellant testified that in 1943 he made efforts to get whiskey for the taverns belonging to him and his relatives, that this was his original

[2] The data in the Table are from pp. 3-9, Transcript of Mr. Schnacke's opening argument August 31, 1953.

Transcripts of the summations at the trial are part of the record on this appeal (R. 65-6).

motivating thought, and it spread into getting whiskey for customers and friends (R. 409, 418). Later when he saw how this was expanding into friends of friends and large volumes, he stopped it (R. 411). In his efforts to get whiskey for his bars, he contacted wholesalers, advertised in the papers (Deft. Exh. E), but all without success. (R. 385-387).

He acquired whiskey by paying over-ceiling prices, the same whiskey he sold at prices over ceiling. The whiskey which he purchased over ceiling was transferred at ceiling to taverns owned by him and members of his family (R. 366). Generally other purchasers paid him over-ceiling prices (R. 426ff).[3]

Appellant testified that for the purpose of acquiring whiskey from the East, he contacted William Gersh, who published a coin machine paper. He first had a talk with Gersh about whiskey in the spring of 1943.[4] As a result he sent Gersh $5,000 in June 1943, not to pay for the whiskey but to apply on the overage that the whiskey cost over and above its regular invoice price. As a result the first shipment of whiskey arrived from the East through Franciscan Co. (R. 353-9.) In his first arrangement with Gersh he was to pay $20 a case overage above ceiling. This continued for three shipments. Thereafter at Gersh's suggestion the overage was $25 a case. (R. 361-2.)

Appellant further testified: I sent the money to Gersh in various ways. I would issue a check and buy a bank draft for it; or I would buy a bank draft for cash without having issued a check; or I would send the money to him in cash by mail or express, or if I saw him I would deliver it to him either in cash or by check (R. 359-360).

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[3] Appellant testified that there were a few close personal friends he might have let buy at ceiling (R. 429-431).

[4] Appellant was asked what conversation he had with Gersh. The Government objected and the objection was sustained (R. 355-6).

I definitely recall sending the following payments to Gersh, all to be applied against the overage of the whiskey (R. 361).

$5,000 in June 1943 (R. 358). I drew a check upon my bank account (Deft. Exh. E, R. 370) and purchased a bank draft which I sent him (R. 363).

3,300 cash by mail in the middle of August 1943 (R. 359).

5,000 at the end of August 1943, in cash by mail (R. 461).

12,500 by cashier's check payable to Gersh dated September 29, 1943 (Deft. Exh. I), which I purchased for cash (378-9).

60,000. Of this amount $30,000 was in cash and $30,000 was in a bank draft, which I delivered to him in New York in November, 1943 (R. 360-361); Deft. Exh. F, R. 371-2).[5]

30,000 cash by express in December or January 1944 (R. 362).

And there were a number of mailings to Gersh of $1,000; $1,200; $1,500 apiece (R. 404).

In 1944 I gave Gersh $3,000 cash in New York for the purpose of winding up our transactions (R. 367-8).

During this period I received money back from Gersh in accordance with our understanding for the two instances when I transferred money by check in a way that appeared on my books. I entered the original $5,000 on my books

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[5] On cross-examination defendant was asked if the $30,000 draft, a check on a Portland bank payable to Lou Wolcher, and endorsed by Wolcher and Gersh, did not represent merely an accommodation by Gersh in helping Wolcher to cash his check. (R. 397-8.) That was Gersh's testimony at the first trial (Record 12992, pp. 560-562; Appendix C to Petition for Certiorari, pp. 20a-22a.)

as a suspense item, Bill Gersh. When he returned the $5,000 by check dated August 13, 1943 (Deft. Exh. G, R. 374), we put it in the bank account and cancelled the entry (R. 364).

In November 1943 I didn't have enough over-ceiling money to send the required cash and I borrowed $30,000 to buy a bank draft payable to me which I endorsed over to Gersh. That was the same, for all practical purposes, as a check on my bank account. He was to return that money to balance off my books (R. 380). He sent me a check for $22,750, dated February 1, 1944 (Deft. Exh. H, R. 375) and a check for $2,000 drawn by his wife (R. 379); Deft. Exh. J, R. 383). Gersh's accountant suggested that I let Gersh pay for some equipment, to account in some measure for his handling that money. I arranged for Gersh to make a payment of $5,250 to Runyon Sales Co. for some phonographs I had purchased. (R. 376-7.)

The $12,500 cashier's check which I bought for cash did not appear on my books, and Gersh never returned that money. Nor did he return any of the cash money I sent him. (R. 379.)

Appellant testified that he kept no books as such on these transactions, and kept only a brief memorandum record at that time of amounts owing, which he later disposed of so as to avoid unnecessary records involving a black market commodity (R. 382, 437-439).

The instances that involved a written record, because checks were used, were covered up so as to avoid showing a whiskey transaction. (R. 403-5.)

On cross-examination it was brought out that appellant had no record of the money he sent to Gersh by mail or by express (R. 403-4).

Appellant pointed out that he made no profit overall on the whiskey sold at wholesale, but that his sales over ceiling did yield a profit, which was duly reported, in the sense

that liquor which was otherwise unavailable was purchased and sold by the glass in the taverns owned by him and his family, and that the case purchases by these taverns were made at ceiling as a result of his purchases and sales. "So there was a profit made, but not from the sale of the liquor by the case as such." (R. 410.) There is no contention of understatement of income in the returns for these taverns.

Defense counsel was stopped from asking questions of Richard Appling, special agent in charge, to lay a foundation for introducing in evidence the bank account records of William Gersh, which were exhibits at the first trial. Mr. Schnacke objected that the bank account of some stranger to the trial was not material, and the line of questioning was stopped. (R. 465-6.)

It should also be noted that Gersh's bank account record corroborated the cash transfers by Wolcher to Gersh of $3,300, deposit entry August 11, 1943; $5,000, deposit entry August 31, 1943; and $30,000, deposit entry January 4, 1944. The record at the first trial shows that, faced with these bank records, Gersh admitted these cash receipts from Wolcher not only in his testimony at the trial but also to the revenue agents. See petition for certiorari, pp. 15-16, and record references in appendix accompanying petition.

C. Trial Court's Charge

This summarized the contentions of the Government and defendant and instructed the jury as follows (R. 14109, 382-3):

> "Now I think it might be well if I very briefly stated to you what the Court believes is the issue of the case as it appears from the contentions respectively of the parties—the Government on the one hand and the defendant on the other hand. The Government contends, as appears from the argument made by Government counsel, that the cash monies that the Government proved the defendant received from the sale of liquor and which the defendant admitted that he received, were income and were net income, and that the

whiskey was purchased for the purpose of making a profit on it in its resale and not for the benefit of the defendant's own taverns, or his friends'. The Government contends that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention.

"The defendant, on the other hand, admits that the black market transactions were had by the defendant, but contends that he made no profit in connection with these transactions and that therefore he had no net income and that therefore he is not chargeable with any evasion of income taxes; that he made no profit in the matter, because he had to pay out certain monies in connection with the transactions and that therefore the net result was that he had no profit in the matter, and that therefore he is not chargeable with a violation of federal statute.

"So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

D. The Motion for New Trial and Supporting Affidavits

1. Mr. Corriston's affidavit concerning Gersh's whiskey black market arrangements.

The motion for new trial on the ground of newly-discovered evidence was accompanied by two affidavits, one by Edwin F. Corriston (R. 13), and one by Murray M. Chotiner (R. 18).

The affidavit of Corriston summarized is to the effect that in 1943 he met Gersh in New York; that Gersh told him he had been in contact with Wolcher, a mutual friend; that Wolcher had some taverns on the West Coast and was having difficulty in obtaining whiskey on the Coast; that he, Gersh, had told Wolcher he could get him whiskey in the East and that he had received cash from Wolcher, which he had with him, for making payments over the ceiling; that he, Gersh, did not know exactly where to get the whiskey although he knew it was procurable in the East and asked me whether I might, through my contacts in the whiskey field, know where he could get a quantity of whiskey for Wolcher; that apparently to convince me that he was seriously interested in buying this whiskey he pulled out an envelope and showed a wad of hundred dollar bills.

The affidavit goes on to state that affiant called Gersh and told him to contact a Frank Mayer in New Jersey and that Mayer was expecting to hear from him; that thereafter Gersh thanked affiant for making the contact; that affiant and Gersh agreed that Wolcher should be kept in ignorance of the fact that affiant had helped Gersh in this matter; that several months later Gersh told him at lunch that the previous contact had petered out that Wolcher needed more whiskey and did affiant have any further ideas on where he, Gersh, could get it.

Affiant relates that a few days later he advised Gersh that he, Gersh, would be contacted by a man named Garry Taylor or his associate Carlin; that Taylor called affiant and said the transaction would require about $50,000 in cash and that he and Carlin wanted to be sure that Gersh was good for so much money; that affiant told Gersh what Taylor had said, that Gersh said that was no problem as he had already received plenty of cash from Wolcher, and that affiant passed that information on to Taylor.

The affidavit continues that, as a result of these calls, affiant arranged a meeting between Taylor, Gersh and himself in New York and that he told Gersh that Taylor wanted Gersh to bring $10,000 with him to the meeting to show good faith and make the deal; and that the meeting was held. There was a conversation pertaining to the monies involved; Taylor said there was approximately $50,000 involved in cash payments for the whiskey; that Gersh said he had all the money in hand and was prepared to pay for the shipments when ready. Taylor said he wanted $10,000 now. Gersh handed Taylor an envelope and said it contained "ten big ones" as a deposit; Gersh and Taylor left the table for a few minutes and when they returned Taylor said everything was O.K. The affidavit further states that Wolcher was never advised of this transaction until after the last affirmance of his conviction by this Court.

2. Mr. Chotiner's affidavit of statement of United States Attorney Burke concerning evidence in his possession.

Mr. Chotiner's affidavit in support of the motion for new trial states that on December 15, 1953, some months after the second conviction, Mr. Chotiner, in his capacity as counsel for defendant, conferred with United States Attorney Lloyd H. Burke, and that Mr. Burke then told him in substance and effect:

> We have evidence that the money Wolcher paid to Gersh was passed on to people very high in the Syndicate, who had no relation or contact with Wolcher, with very little, if any, of the money being retained by Gersh."

As noted in the argument before the District Judge this affidavit is based on notes which Mr. Chotiner made in his hotel room in San Francisco, immediately following his talk with Mr. Burke and while everything was fresh in his mind (R. 45). (Mr. Chotiner advises that he has these notes.)

In regard to the significance of the newly-discovered evidence, the motion for new trial pointed out that in his summation Mr. Schnacke had tellingly argued that there was no support or corroboration for any of defendant's testimony as to shipping cash to Gersh for use in black market whiskey purchases, or for defendant's testimony that the $12,500 sent by check to Gersh was for this purpose. (R. 6-8.)

There was filed with the District Court, to aid in consideration of the issues, the printed transcript of the trial; certified transcripts of the summations; the petition for certiorari, Government's opposition and petitioner's reply brief. (R. 5.) These are all part of the record on this appeal. (R. 64-5.)

The motion for new trial prayed that the prosecution be required to disclose all the evidence known to the Government as set forth in Mr. Chotiner's affidavit. (R. 12.) Defense counsel submitted to the court that at least the first step should be production for inspection by the District Judge. (R. 50.)

E. Opposing Affidavit of United States Attorney Burke

The United States Attorney, Mr. Lloyd H. Burke, filed an opposition to the motion supported by his affidavit (R. 19) in which he states that he had a 45-minute conversation with Mr. Chotiner in December of 1953; that he could not recall with any degree of accuracy the language used; that it was possible that he made the statement to Chotiner that he had evidence that the money paid to Gersh was passed on to people very high in the syndicate, etc. The United States Attorney qualifies this by stating in his affidavit—although he does not assert that he stated this to Mr. Chotiner—"that the word 'evidence' if used was intended to mean all information, whether the result of speculation, rumor, suspicion or otherwise." He further

states in his affidavit that he has no knowledge of any legal evidence other than the testimony adduced at the trial to the effect that Gersh was engaged in black market liquor transactions.

F. Order of the District Judge

The order of the District Judge stated that the motion for a new trial, with supporting affidavits, "in my opinion, fails to set forth any legal basis for granting a new trial to the defendant on the ground of newly discovered evidence." (R. 26.)

G. Justice Douglas' Opinion and Order Granting Bail

The Appendix to this brief contains the opinion of Mr. Justice Douglas, Circuit Justice for the Ninth Circuit, December 31, 1955, granting bail pending the disposition of this appeal.

SPECIFICATION OF ERRORS

Specification No. 1

The District Judge erred in ruling (R. 26) that the Corriston affidavit (R. 13) was not a legal basis for granting the motion for new trial on the ground of newly-discovered evidence.

Specification No. 2

The District Judge erred in failing to require the United States Attorney to produce for examination by the Court any evidence in his possession, that the money Wolcher paid to Gersh was passed on to people high in the whiskey syndicate, who had no relation or contact with Wolcher, notwithstanding the assertion of the United States Attorney that such evidence in his possession is not legally admissible.

Specification No. 3

The District Judge erred in failing to set forth findings of fact and conclusions of law.

ARGUMENT

Wolcher admits over-ceiling receipts on sales of whiskey but defends on the ground of amounts paid to Gersh to use as cash bonuses in acquiring the whiskey in the black market. He appeals to this Court in order to gain the right to establish his innocence by the use of newly discovered evidence which corrobates otherwise unsupported testimony on the critical issue that he made payments to Gersh for the purpose of buying whiskey in the black market.

This case marks Wolcher's third appearance before this Court. Insistently the Government's attorneys, on one basis or another, have sought to prevent a full showing concerning Gersh.

On the first appeal, Gersh, as rebuttal witness for the Government, admitted receipt of large sums from Wolcher, but contended they were to buy coin machines which required advance payments in cash. This Court held inter alia that Wolcher should have been permitted to impeach Gersh by introducing trade journals showing that such advance cash payments were not necessary to buy coin machines. *Wolcher* v. *United States,* 200 F. 2d 493.

On the second trial, Gersh, who had been subpenaed by the Government, was not called as a witness. The jury, which recommended leniency, was not even aware of Gersh's bank records, which had been exhibits at the first trial, corroborating substantial cash payments to Gersh. The District Judge stopped questioning of the internal revenue agent concerning the Gersh bank records, and denied the application to reopen made by defense counsel upon learning that Gersh, who had been released from Government subpoena, was in fact available in San Francisco. This Court held that the procedural ruling of the trial judge would not be disturbed on appeal. *Wolcher* v. *United States,* 218 F. 2d 505.

Mr. Corriston's testimony presented by this motion for new trial is of undoubted significance. It makes available for the first time evidence strongly and clearly corroborating the otherwise uncorroborated testimony of appellant on the crucial issue that his payments to Gersh were for the purpose of obtaining whiskey in the black market. It further substantiates Wolcher's testimony that he delivered $30,000 cash to Gersh in person in November, 1943.

The issue is whether the rules of evidence prohibit the admission of this significant testimony. A second issue is whether the United States Attorney may refuse to disclose to the Court evidence in his possession that corroborates Wolcher on this same matter merely by asserting that in his opinion the evidence is not legally admissible.

I. THE DISTRICT JUDGE ERRED IN RULING THAT MR. CORRISTON'S AFFIDAVIT WAS NOT A LEGAL BASIS FOR GRANTING THE MOTION FOR NEW TRIAL.

(Specification of Error No. 1)

The District Judge ruled that the motion and supporting affidavits failed to set forth a legal basis for granting the motion for new trial on the ground of newly discovered evidence (R. 26).

In regard to Mr. Corriston's affidavit, this reflects a ruling sustaining the Government's position (R. 24) that the motion for new trial must be denied on the ground that Corriston's testimony would not constitute legally admissible evidence.

A. Corriston's testimony concerning Gersh is not inadmissible as res inter alios acta and does not relate to a "stranger" to the case or the issues. It corroborates defendant's explanation on the heart of the case.

The Government argues that Corriston's testimony is hearsay and is such that, if produced at the trial, would have been inadmissible as res inter alios acta (R. 24), a phrase or maxim which describes the inadmissibility of

evidence of things done between strangers and invokes the question of relevancy. 77 C.J.S., "Res" (Maxims), p. 275; Bouvier, Law Dictionary (3rd rev.) p. 2161.

Gersh is emphatically not a stranger to this case or to the issues in the case. Wolcher's defense to the charge of income tax evasion is like a plea of confession and avoidance. He admits the over-ceiling receipts on his sales of whiskey, but pleads that he made over-ceiling payments on his purchases of case whiskey.

He testified that he made arrangements with Gersh for Gersh to get whiskey for appellant by paying cash bonuses in the whiskey black market, and that he sent large sums to Gersh, not for the whiskey proper, but for the black market overage, the amount that the whiskey cost over and above the regular invoice price.

It is manifest, as Justice Douglas stated in his opinion (Appendix) that if Corriston's evidence is admissible "it might well tip the scales in defendant's favor, as it goes to the heart of the case."

Indeed that conclusion is actually implicit in this Court's ruling on the first appeal where it held that the issue as to the purpose of Wolcher's sending money to Gersh was so material that it found reversible error in the exclusion of trade journals showing that advance cash payments were not necessary to purchase coin machines. *Wolcher* v. *United States,* 200 F. 2d 493 (9th Cir.). That evidence merely impeached the explanation of Gersh, that he had received money from Wolcher to pay cash in advance for coin machines.

Corriston's testimony is much more significant since it affirmatively corroborates Wolcher's otherwise unsupported testimony that his money transfers to Gersh were to obtain black market whiskey. There is, of course, a fundamental distinction between corroborative evidence, confirming the otherwise unsupported testimony of a defendant, and cumulative evidence, which refers to evidence

of the same kind as that already in the case. 32 C.J.S. Evidence, p. 1039. Corriston's corroboration of Wolcher's explanation fills the critical gap stressed in Mr. Schnacke's summation that Wolcher's explanation of transfers to Gersh in order to get black market whiskey was unsupported by other evidence (R. 7-8).

B. Corriston's testimony is admissible as part of the res gestae

The Government's hearsay objection is answered by the rules of evidence governing "res gestae".

1. The hearsay rule is not involved at all where conversations are introduced in evidence as proof of a matter in issue. Wigmore, Evidence (3d ed.) sec. 1770(1). In this case Gersh's solicitations, negotiations and verbal agreements for the black market whiskey purchase are admissible on this ground. That they are admissible as proof of a matter in issue is demonstrated by Mr. Schnacke's own telling argument to the jury (R. 8) that Gersh was identified with the coin machine field, and was not shown by any evidence whatever to have been engaged in any black market whiskey transactions.

Since in this case Gersh's conversations were in and of themselves activities in the whiskey black market, testimony concerning these conversations is not objectionable as hearsay.

2. Moreover, Gersh's conversations fall within the exception to the hearsay rule that is most commonly referred to when the doctrine of admissibility of the res gestæ is invoked. That is a rule,—applicable where there is a "main fact" or principal transaction which is admissible in evidence,—to cover the circumstances, facts and declarations which "grow out of" the main fact or principal transaction and serve to illustrate its character, and are contemporary with it or so nearly connected with it as to form a part of it. Wigmore, Evidence (3d ed.) sec. 1767 et seq.; Jones, Evidence (4th ed.), sec. 358; Wharton, Criminal Evidence (10th ed.), sec. 262ff; 32 C.J.S., Evidence, sec. 402, 411.

The main fact may be "either the ultimate fact to be proved or some fact evidentiary of that fact." 32 C.J.S., Evidence, sec. 405.

The Supreme Court regards the doctrine as based in part on the distortion which would result if the "verbal facts" were stricken from a context where what is done and what is said are necessarily interrelated (*Insurance Co.* v. *Mosley,* 8 Wall. 397, 408).

In *St. Clair* v. *United States,* 154 U.S. 134, 149 (1894), the Court accepts Wharton's analysis, justifying admission of the res gestae, whether doings or declarations:

> "Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act."

Wharton thus distinguishes between res gestae as "events speaking for themselves" through the words and acts of participants, and the words and acts of participants "narrating the events." What is said or done by participants "under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks." Wharton, Criminal Evidence (10th ed.), sec. 262.

Business relations are governed by the same general doctrine that "declarations which are the immediate accompaniment of an act" are admissible as res gestae, "remembering that immediateness is tested by closeness not of time but of causal relation." Wharton, op. cit. sec. 265.

The main act or transaction is not necessarily confined to a particular point of time but may extend over a longer or shorter period. Jones, op. cit., sec. 358. A transaction may include a series of occurrences extending over a period of time. 32 C.J.S., Evidence, sec. 408, sec. 411, note 88.

The general rule is well recognized that "where an offense is the termination of a continuous transaction, it is admissible to show the entire train of connected facts leading to, up to and forming part of the preparation for the commission of the offense, whether consisting of conduct, declarations, or other occurrences." *Sprinkle* v. *United States,* 141 Fed. 811 (4th Cir.).

Finally, it has often been noted that the tendency of the decisions has been to extend, rather than to narrow, the scope of the res gestae exception to the hearsay rule. *Insurance Co.* v. *Mosley,* 8 Wall. 397, 408; *Sprinkle* v. *United States, supra.*

Applying these principles to the *Wolcher* case, the "main fact" or "principal transaction" in this case embraces the whiskey purchases in the black market, the series of transactions lying between Wolcher's making the arrangement with Gersh for the objective of securing the whiskey and the final delivery of the whiskey to Wolcher, or more specifically to the licensed wholesaler distributing in accordance with Wolcher's directions.

Gersh's solicitations, negotiations and verbal agreements were actually part of his black market activities.

Plainly, too, Gersh's declarations that his arrangements were for the benefit of and for delivery to Wolcher, serve to characterize his role, and are part of the res gestae. They were not mere recitations of a past event for the possible purpose of advantage in litigation. They were an integral part of the current event, to induce Corriston to assist Gersh in making the arrangements. Similarly Gersh's declaration of receipt of cash from Wolcher was

part of the current event, to provide the necessary assurance that Gersh had the means of consummating the transaction.

3. There has been carved out of the res gestae decisions a special rule that declarations of an existing state of mind in the sense of an intent, plan or design to do an act are admissible to prove that the intent, plan or design was actually carried out, and that the declarant did the act. Wigmore, Evidence (3d ed.), sec. 1725. The leading case is *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285 (1892), where the declaration was held admissible to prove that declarant together with another did an act in the future (go on a trip).

Gersh's declarations, taken together with the conversation with Taylor, the supplier of the black market whiskey, are evidence of his plan and design to have whiskey shipped to Wolcher on the West Coast and to pay a cash bonus in addition to the $10,000 deposit, for this purpose.

The authorities have often noted that the contemporaneous declarations that are part of the res gestae are likely to be more reliable even than the subsequent testimony of the declarant. Gersh's declarations to Corriston that explain the significance of his contemporaneous acts are not only admissible but may be looked to as more reliable than Gersh's subsequent testimony and explanation.

C. Corriston's testimony is admissible under the exception to the hearsay rule governing declarations of a co-conspirator.

Corriston's testimony is admissible under the rule establishing the admissibility of acts and declarations of co-conspirators. *United States* v. *Gooding,* 12 Wheat. 460 (1827); *Lutwak* v. *United States,* 344 U.S. 604, 617 (1953).

Wolcher's testimony as to his arrangements with Gersh plainly establishes a conspiracy to violate the law in paying over-ceiling prices for whiskey. Every act and declaration of Gersh in pursuance thereof is admissible in evidence

whether Wolcher was or was not present at the transactions.

Although the *Gooding* case announced the doctrine as one of agency, the Supreme Court soon thereafter held the rule applicable to the declarations of one who acted "in conjunction with" defendant. See *American Fur Co.* v. *United States,* 2 Pet. 358, 364-5 (1829):

> "The principle asserted in the decision of that point, and applied to the case was, that whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal.
>
> "The opinion of the court in the present case is not less correct, whether Davis was considered by the jury as having acted in conjunction with Wallace, or strictly as his agent. For we hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gestae, may be given in evidence against the others; and this we understand, upon a fair interpretation of the opinion before us, to be the principle which was communicated to the jury."

In *Hitchman Co.* v. *Mitchell,* 245 U. S. 229, 249, the Supreme Court expressed the rule in terms of the conception that when persons "associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership."

This Court has recently analyzed the position of aiders and abettors and co-conspirators and emphasized the elements of unlawful community of purpose and the least degree of concert where the parties are active partners in the criminal intent. *Cosgrove* v. *United States,* 224 F. 2d 146, 152 (9th Cir.).

The black market purchases of whiskey are a critical fact in this trial for income tax evasion. Wolcher and Gersh were "partners in crime" in regard to those black market purchases of whiskey. Wolcher having testified that he had arranged with Gersh to obtain whiskey for him, the Government could clearly have introduced Corriston's testimony in a trial of Wolcher for making, conspiring to make, or aiding and abetting, purchases of whiskey at prices above ceiling.

Corriston's testimony is likewise admissible to prove such black market violations although these are not merely an offense but are offered as a defense,—a defense to the charge of tax evasion.

So far as doctrines of agency are concerned, it is clear that declarations of an agent made in connection with a transaction are admissible in evidence as part of the res gestae, whether offered for or against the principal. 32 C.J.S. Evidence, sec. 410.

The Government argues that the declaration of a co-conspirator is only admissible in evidence *against* his co-conspirator. There might be some weight in this argument if the declarations were exculpatory and self-serving when made. But Gersh's declarations were not exculpatory or self-serving when made, and on the contrary were implicating, both as to Gersh and as to Wolcher.

The situation before this Court may be likened to that before the Supreme Court, when it came to consider whether the dying declaration exception could be invoked by the defendant as well as by the Government when the declarant was anticipating death although a substantial time period elapsed prior to death. The Court said simply that "no more rigorous rule" of evidence should be applied because the rule was to the defendant's advantage rather than the Government's. *Mattox* v. *United States,* 146 U.S. 140, 152 (1892).

It would offend justice and reason that appellant should be more circumscribed in proving his own guilt (of the other crime), his criminal associations and the activities of his criminal associates, than the Government would be if trying him for such crime.

D. The order is not one calling for affirmance as a ruling based on the exercise of discretion.

1. The ruling of the District Judge that the motion failed to set forth any "legal basis" for granting a new trial was based on a ruling that the Corriston evidence was inadmissible.

Although ordinarily the granting or denial of a motion for new trial rests in the sound discretion of the trial court and does not present a question for consideration by an appellate court, that rule does not apply where the District Judge denies the motion on the ground that the evidence tendered is not admissible. See *Mattox* v. *United States,* 146 U. S. 140, 147 (1892).

2. On motion for new trial, it is the duty of the trial judge, both to the parties and to the reviewing court, "to file a memorandum of the reasons for his action on the motion." *United States* v. *Walker,* 19 F. Supp. 969, 970 (W.D. Mo. 1937).

Otherwise, there is the danger of miscarriage of justice in that misconceptions, whether of fact or law, can not be remedied either by the District Judge himself, upon clarification by the parties, or by the appellate court. Or a ruling on a matter or law held contrary to the view of the appellate court, may be sustained on the assumption that it might have been rendered on a question of fact.

3. In the present case, there is no proper basis for an argument that the ruling should be sustained as an exercise of discretion. The District Judge did not purport to exercise his discretion on the facts, but rather, in effect,

sustained a demurrer to the motion as without a legal foundation.

As Justice Douglas stated in his opinion (Appendix) Corriston's evidence, if admissible, is "probative of a crucial fact issue in the case" and "might well tip the scales in defendant's favor, as it goes to the heart of the case."

Justice Douglas also stated (Appendix): "The district judge may have meant that the result of the prosecution would hardly have been different if the newly discovered evidence were admitted since his recollection was that there were large sums still unaccounted for on that theory of the case. As I read the record, there would be no sums unaccounted for if this defense were established." [6]

As stated above, the ruling of the District Judge rests upon an opinion as to the legal inadmissibility of the evidence tendered, which is fully reviewable by this Court.

II. THE DISTRICT JUDGE ERRED IN FAILING TO REQUIRE THE UNITED STATES ATTORNEY TO PRODUCE FOR EXAMINATION BY THE COURT ANY EVIDENCE IN HIS POSSESSION, THAT THE MONEY WOLCHER PAID TO GERSH WAS PASSED ON TO PEOPLE HIGH IN THE WHISKEY SYNDICATE, WHO HAD NO RELATION OR CONTACT WITH WOLCHER, NOTWITHSTANDING THE ASSERTION OF THE UNITED STATES ATTORNEY THAT SUCH EVIDENCE IN HIS POSSESSION IS NOT LEGALLY ADMISSIBLE.

(Specification of Error No. 2)

1. Mr. Chotiner's affidavit (R. 18) sets forth that in his conversation with Mr. Burke, the United States Attorney, Mr. Burke stated in substance: "We have evidence that the money Wolcher paid Gersh was passed on to people very high in the syndicate, who had no relation or contact with Wolcher, with very little, if any, of the money being retained by Gersh."

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[6] Apparently Justice Douglas had reference to the colloquy at R. 57. It is indisputable as a matter of fact that the District Judge's recollection at the hearing, and Mr. Schnacke's statement, were inaccurate.

Mr. Chotiner's affidavit was based on the notes which he took in his hotel room immediately after his conversation with Mr. Burke (R. 45), and which are still in his possession.

The motion for new trial included a prayer that the United States Attorney be required to divulge all the evidence in the hands of the Government showing defendant's payments to Gersh and Gersh's payments to the syndicate. (R. 11, 12.) Defense counsel argued that at least the first step should be production for inspection by the District Judge (R. 50).

The motion for a new trial based on Chotiner's affidavit on its face purports to show that the United States Attorney had evidence showing over-ceiling payments by Wolcher to Gersh and by Gersh to persons in the whiskey syndicate. This statement in Chotiner's affidavit was not denied by the United States Attorney but he sought to avoid the legal effect of the same by his ipse dixit statement that the evidence he referred to was not legally admissible evidence. It was not for the United States Attorney to make a conclusive determination of the legal character or admissibility of any evidence he possessed. As said in the case of *Griffin* v. *United States,* 182 F. 2d 990, 993 (C.A. D.C.):

> "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful."

It was the duty of the trial court as requested in the motion for a new trial to take evidence for the purpose of

ascertaining whether the information in the hands of the United States Attorney would be legally admissible evidence at a new trial of the case. It was not for the United States Attorney to make a conclusive determination of this question.

In *United States* v. *Rutkin,* 212 F. 2d 641 (3d Cir.), the Court held that the prosecution must produce for inspection of the Court a statement obtained by the Government from a witness relative to the case which was not known to the defendant but which the defense claimed corroborated the defendant's testimony.

The *Rutkin* case involved a motion under 28 U.S.C. sec. 2255, based on denial of constitutional rights since time for filing motion for new trial had expired. *A fortiori* the same relief can be obtained for the new trial where time therefor has not expired.

Motion for new trial on the ground of newly discovered evidence may be based on evidence unknown to defendant which is in the Government's possession.

United States v. *Miller,* 61 F. Supp. 919 (S.D. N.Y. 1945).

2. Mr. Burke's affidavit sets forth that this information developed as a result of an investigation by agents of the Internal Revenue Service requested by Wolcher, and that the Government concluded that there was no legally admissible evidence warranting an indictment of Gersh for perjury although sufficient doubts had been raised of Gersh's reliability that it was decided not to call him as a witness (R. 20-21).

Mr. Burke then goes on to say that in his opinion defendant's counsel had substantially the same information concerning Gersh as did the Government. This opinion does not provide a foundation for resisting the application. Appellant did provide leads to the Government. Thus he provided an affidavit from Mr. Sugarman of Runyan Sales

Co. denying Gersh's testimony that it was he, Gersh, who originated the purchase of coin machines to send to Wolcher. Likewise appellant had called the attention of the Government to the fact that its own files show that Penn-Midland Company was selling whiskey in the black market, and particularly show a black market payment on a shipment from Penn-Midland to one Blumenthal, a shipment which arrived in San Francisco at the same time as Penn-Midland's shipment of 2,038 cases of Old Boston Rocking Chair whiskey to George Barton Co. which was acting as consignee of whiskey for Wolcher.

But defendant's leads in no way covered what Mr. Burke told Mr. Chotiner. Before he learned of Mr. Corriston's evidence, defendant had no leads either about Gersh's whiskey connections, or that the money which defendant paid Gersh was passed on to people high in the whiskey syndicate.

III. THE DISTRICT JUDGE ERRED IN FAILING TO SET FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Specification of Error No. 3)

Denial of a motion for new trial results in a final, appealable order. It is the duty of the District Judge to set forth his findings and conclusion, not necessarily in a formal array but in an informative memorandum or opinion. See page 24, *supra* (par. 2).

In this case there is no prejudice because it is clear in context that the ruling of the District Judge is based on the inadmissibility of the Corriston affidavit.

If the District Judge had intended to exercise his discretion, appellant would be denied a safeguard and the error would be prejudicial.

CONCLUSION

Appellant could not overcome the prosecution's telling argument that there was absolutely no corroboration of his testimony that he transferred funds to Gersh for the purpose of making purchases in the black market of the whiskey which was shipped to appellant.

Now corroboratory testimony is offered by this motion for new trial, testimony that, as Justice Douglas said, is "probative of that crucial fact issue. * * * If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case."

Neither doctrine, reason nor justice require the rejection of the evidence.

Appellant has been convicted of the OPA offense of which he is guilty, convicted on a plea of guilty. It would be beyond reason and justice that he should also be imprisoned for income tax evasion because the jury, which recommended leniency, had no opportunity to consider whether the new evidence would "tip the scales in defendant's favor" and raise a reasonable doubt as to whether he was guilty of tax evasion.

The order of the District Judge should be reversed.

Respectfully submitted,

Leo R. Friedman,
Harold Leventhal,
Attorneys for Appellant.

Dated, San Francisco, California,
January 17, 1956.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. —— October Term, 1955

LOUIS E. WOLCHER, *Appellant*,

v.

UNITED STATES OF AMERICA

APPLICATION FOR BAIL

[December 31, 1955]

Mr. Justice Douglas, Circuit Justice

Wolcher has been sentenced to two years' imprisonment and fined $10,000 on a judgment of conviction of federal income tax evasion. The judgment has been affirmed by the Court of Appeals. 218 F. 2d 505. A motion for a new trial based on newly discovered evidence was denied by the District Court and an appeal from that order is now pending in the Court of Appeals. The District Court and the Court of Appeals have denied bail pending that appeal. Wolcher now makes application for bail to me as Circuit Justice. Rule 46(a)(2) of the Rules of Criminal Procedure authorizes me to grant the application "only if it appears that the case involves substantial question which should be determined by the appellate court." See *Herzog* v. *United States*, 75 S. Ct. 349.

A trial judge's order denying a motion for a new trial on an appraisal of newly discovered evidence should remain undisturbed "except for most extraordinary circumstances." *United States* v. *Johnson*, 327 U.S. 106, 111. Nevertheless, after hearing oral argument and studying the record, I feel that the appeal raises "a substantial

question'' within the meaning of Rule 46(a)(2), if that Rule is given the liberal construction necessary to protect the right of appeal. See *Herzog* v. *United States, supra.*

The motion for a new trial was accompanied by an affidavit of one Corriston. He offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as over-ceiling payments for black market whiskey, thus violating one federal law but accounting for the disposition of the funds on which he failed to pay the income tax. If the district judge denied the motion because he considered the Corriston testimony to be of too little weight in the totality of the trial to justify a new trial, his judgment that a new trial was not ''required in the interest of justice'' within the meaning of Rule 33 of the Rules of Criminal Procedure, would be entitled to special deference. He stated that in his opinion the motion failed to set forth any ''legal basis'' for granting a new trial. The district judge may have meant that the result of the prosecution would hardly have been different if the newly discovered evidence were admitted since his recollection was that there were large sums still unaccounted for on that theory of the case. As I read the record, there would be no sums unaccounted for if this defense were established. The district judge may, on the other hand, have meant that the Corriston testimony was inadmissible, because it was hearsay. Counsel for Wolcher argue that the Corriston testimony would be admissible even though it was hearsay, because it relates to statements of Gersh made in furtherance of a conspiracy between Wolcher and Gersh to obtain black market whiskey—a novel suggestion since those statements would be made on behalf of the co-conspirator rather than against him. Yet it is claimed that the agency theory which admits the statement when it hurts the co-conspirator (see *Lutwak* v. *United States,* 344 U.S. 604, 617, and cases cited), likewise makes it admissible when it aids him. If, as appears to be the case, the denial of the motion for a

new trial by the district judge was at least in part a ruling on a point of evidence, a "novel" question, within the meaning of *Herzog* v. *United States, supra,* at 351, is presented. If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case. I express no opinion on the merits, but I consider the question of sufficient substance to grant this application for bail.